

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In Re:

**CHAPTER 7 CASE**

Brian Thomas Whittle  
SSN XXX-XX-2136  
Janelle Lara Whittle  
Janelle Lara Gager  
SSN XXX-XX-7123

**CASE NO. 04-33814**

Debtor.

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**NOTICE OF HEARING AND MOTION FOR RELIEF FROM STAY**

TO: Debtor and other entities specified in Local Rule 9013-3(a).

1. U.S. Bank, N.A. (hereinafter "Secured Creditor"), by its undersigned attorney moves the Court for the relief requested below and gives notice of hearing herewith.

2. The Court will hold a hearing on this motion on September 1, 2004, at 9:30 a.m., or as soon thereafter as counsel can be heard, before the Honorable Dennis D. O'Brien in Courtroom 228A of the above entitled Court located at U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered not later than August 27, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays and holidays), or served and filed by mail not later than August 23, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays and holidays). **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Federal Rule of Bankruptcy Procedure 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this case was filed on June 29, 2004. The case is now pending in this Court.

5. This motion arises under 11 U.S.C. § 362 and Federal Rule of Bankruptcy Procedure 4001.

This motion is filed under Federal Rule of Bankruptcy Procedure 9014 and Local Rules 9013-1 - 9019-1. Movant requests relief from the automatic stay with respect to property subject to a lien. Movant requests said relief be effective immediately notwithstanding Federal Rule of Bankruptcy Procedure 4001(a)(3).

6. Debtor is indebted to Secured Creditor in the original principal amount of \$152,097.00, as evidenced by that certain Promissory Note dated June 25, 2003, a copy of which is attached hereto as Exhibit "A", together with interest thereon.

7. Debtor's indebtedness is secured by a mortgage on real estate in which Debtor has an interest as evidenced by that certain mortgage deed dated June 25, 2003, executed by Brian T. Whittle and Janelle L. Whittle, husband and wife, recorded , as Document No. , a copy of which is attached hereto as Exhibit "B". The name and address of the original creditor is contained in the attached Exhibit "B". The property is located in Olmsted County, Minnesota and is legally described as follows to-wit:

Lot 18, Block 4, Willow Hills Second, in the City of Rochester, Olmsted County, Minnesota.

Secured Creditor is now the holder of said mortgage and is entitled to enforce the terms thereof.

8. At all times material, Debtor was in default of the payments and performance of obligations to Secured Creditor.

9. Pursuant to 11 U.S.C. § 362(g) the burden is on Debtor to prove absence of cause and/or adequate protection. This Secured Creditor's interest in the property is not adequately protected where, as of August 12, 2004, Debtor is delinquent in the making of monthly payments as required for the months of June, 2004 through July, 2004, in the amount of \$1,100.48 each and August, 2004 in the amount of \$1,129.95; accruing late charges and attorneys fees and costs of \$700.00. Debtor has failed to make any offer of adequate protection.

10. Debtor has no equity in the property and the property is not necessary to an effective organization. The value of the property as scheduled by Debtor is \$150,000.00 subject to Secured Creditor's mortgage in excess of \$153,356.82.

The property is also subject to a second mortgage in favor of US Bank in excess of \$41,400.00.

Since this is a liquidation case, no reorganization is being attempted.

11. Secured Creditor desires to protect its interest in the aforementioned property and requests the Court to vacate the stay of actions and allow foreclosure pursuant to Minnesota law.

12. Secured Creditor has incurred and will incur legal fees and costs to protect and enforce its rights in the subject property.

**WHEREFORE**, Secured Creditor, by its undersigned attorney, moves the Court for an order for judgment that the automatic stay provided by 11 U.S.C. § 362(a) be modified so to permit the movant to commence mortgage foreclosure proceedings under Minnesota law and for such other relief as may be just and equitable.

Dated this 12th day of August, 2004.

**WILFORD & GESKE**

By /e/ James A. Geske  
James A. Geske  
Attorneys for Secured Creditor  
7650 Currell Blvd., Suite 300  
Woodbury, MN 55125  
651-209-3300  
Attorney Reg. No. 14969X

THIS COMMUNICATION IS FROM A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT. ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

Jul.19. 2004 9:23AM

U.S. Bank Records

No. 7400 P. 3  
LWILFORD: 890800537

7890800537

Multistate

## NOTE

FHA Case No.

271-894498-1-703

JUNE 25, 2003

[Date]

3820 10TH AVENUE SW, ROCHESTER, MINNESOTA 55902

[Property Address]

04-91249

## 1. PARTIES

"Borrower" means each person signing at the end of this Note, and the person's successors and assigns. "Lender" means

U.S. BANK N.A.

and its successors and assigns.

## 2. BORROWER'S PROMISE TO PAY; INTEREST

In return for a loan received from Lender, Borrower promises to pay the principal sum of

ONE HUNDRED FIFTY TWO THOUSAND NINETY SEVEN AND NO/100

Dollars (U.S. \$ 152,097.00 ), plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of FIVE AND 500/1000 percent ( 5.500 %) per year until the full amount of principal has been paid.

## 3. PROMISE TO PAY SECURED

Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

## 4. MANNER OF PAYMENT

## (A) Time

Borrower shall make a payment of principal and interest to Lender on the first day of each month beginning on AUGUST 1, 2003. Any principal and interest remaining on the first day of JULY 2033, will be due on that date, which is called the "Maturity Date."

## (B) Place

Payment shall be made at 4801 FREDERICK STREET, OWENSBORO, KY 42301

by notice to Borrower.

or at such place as Lender may designate in writing

## (C) Amount

Each monthly payment of principal and interest will be in the amount of U.S. \$ 963.59. This amount will be part of a larger monthly payment required by the Security Instrument, that shall be applied to principal, interest and other items in the order described in the Security Instrument.

## (D) Allonge to this Note for payment adjustments

If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. [Check applicable box]

☐ Graduated Payment Allonge ☐ Growing Equity Allonge ☐ Other [specify]

## 5. BORROWER'S RIGHT TO PREPAY

Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month. Lender shall accept prepayment on other days provided that Borrower pays interest on the amount prepaid for the remainder of the month to the extent required by Lender and permitted by regulations of the Secretary. If Borrower makes a partial prepayment, there will be no changes in the due date or in the amount of the monthly payment unless Lender agrees in writing to those changes.

EXHIBIT A

Jul 19, 2004 9:25AM

U S Bank Records

No. 7400 P. 9

THIS IS TO CERTIFY THAT  
THIS IS A TRUE AND EXACT  
COPY OF THE ORIGINAL SIGNED  
DOCUMENT.

*ML*  
BURNET TITLE

LOAN: 7890900537  
State of Minnesota

[Space Above This Line For Recording Data]

## MORTGAGE

FHA Case No.

271-894498-1-703

THIS MORTGAGE ("Security Instrument") is given on JUNE 25, 2003  
The Mortgagor is

BRIAN T WHITTLE AND JANELLE L WHITTLE, HUSBAND AND WIFE

("Borrower"). This Security Instrument is given to

U.S. BANK N.A.

which is organized and existing under the laws of THE UNITED STATES OF AMERICA, and  
whose address is 4901 FEDERICA STREET, OWENSBORO, KY 42301

("Lender"). Borrower owes Lender the principal sum of  
ONE HUNDRED FIFTY TWO THOUSAND NINETY SEVEN AND NO/100  
Dollars (U.S. \$ 152,097.00 ).

This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which  
provides for monthly payments, with the full debt, if not paid earlier, due and payable on JULY 1, 2033

and for interest at the yearly rate of 5.500 percent. This Security

Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals,  
extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7  
to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements

FHA Minnesota Mortgage - 4/96

4R(MN) 8700

Page 1 of 5

Initials

VMP MORTGAGE FORMS - (800) 821-7281

*JW*  
*BTW*



EXHIBIT B

Jul.19. 2004 9:25AM

U S Bank Records

No.7400 P. 10

under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to the Lender, with power of sale, the following described property located in **OLMSTED** County, Minnesota:

**LOT 18, BLOCK 4, WILLOW HILLS SECOND, IN THE CITY OF ROCHESTER,  
OLMSTED COUNTY, MINNESOTA**

which has the address of **3820 10TH AVENUE SW, ROCHESTER** [Street, City],  
Minnesota **55902**. [Zip Code] ("Property Address").

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

**BORROWER COVENANTS** that Borrower is lawfully seized of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

**THIS SECURITY INSTRUMENT** combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

Borrower and Lender covenant and agree as follows:

#### UNIFORM COVENANTS.

**1. Payment of Principal, Interest and Late Charge.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and late charges due under the Note.

**2. Monthly Payment of Taxes, Insurance and Other Charges.** Borrower shall include in each monthly payment, together with the principal and interest as set forth in the Note and any late charges, a sum for (a) taxes and special assessments levied or to be levied against the Property, (b) leasehold payments or ground rents on the Property, and (c) premiums for insurance required under paragraph 4. In any year in which the Lender must pay a mortgage insurance premium to the Secretary of Housing and Urban Development ("Secretary"), or in any year in which such premium would have been required if Lender still held the Security Instrument, each monthly payment shall also include either: (i) a sum for the annual mortgage insurance premium to be paid by Lender to the Secretary, or (ii) a monthly charge instead of a mortgage insurance premium if this Security Instrument is held by the Secretary, in a reasonable amount to be determined by the Secretary. Except for the monthly charge by the Secretary, these items are called "Escrow Items" and the sums paid to Lender are called "Escrow Funds."

Lender may, at any time, collect and hold amounts for Escrow Items in an aggregate amount not to exceed the maximum amount that may be required for Borrower's escrow account under the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. Section 2601 *et seq.* and implementing regulations, 24 CFR Part 3500, as they may be amended from time to time ("RESPA"), except that the cushion or reserve permitted by RESPA for unanticipated disbursements or disbursements before the Borrower's payments are available in the account may not be based on amounts due for the mortgage insurance premium.

Jul 19, 2004 9:28AM U S Bank Records

No. 7400 P. 15

If the Lender's interest in this Security Instrument is held by the Secretary and the Secretary requires immediate payment in full under Paragraph 9, the Secretary may invoke the nonjudicial power of sale provided in the Single Family Mortgage Foreclosure Act of 1994 ("Act") (12 U.S.C. 3751 *et seq.*) by requesting a foreclosure commissioner designated under the Act to commence foreclosure and to sell the Property as provided in the Act. Nothing in the preceding sentence shall deprive the Secretary of any rights otherwise available to a Lender under this Paragraph 18 or applicable law.

19. Release. Upon payment of all sums secured by this Security Instrument, Lender shall discharge this Security Instrument without charge to Borrower. Borrower shall pay any recordation costs.

20. Waiver of Homestead. Borrower waives all right of homestead exemption in the Property.

21. Interest on Advances. The interest rate on advances made by Lender under paragraph 7 shall not exceed the maximum rate allowed by applicable law.

22. Riders to this Security Instrument. If one or more riders are executed by Borrower and recorded together with this Security Instrument, the covenants of each such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument. [Check applicable box(es)].

☐ Condominium Rider  
☐ Planned Unit Development Rider

☐ Growing Equity Rider  
☐ Graduated Payment Rider

☐ Other [specify]

BY SIGNING BELOW, Borrower accepts and agrees to the terms contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.  
Witnesses:

\_\_\_\_\_

Brian T. Whittle (Seal)  
BRIAN T WHITTLE -Borrower

\_\_\_\_\_

Janelle L. Whittle (Seal)  
JANELLE L WHITTLE -Borrower

\_\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_\_ (Seal)  
-Borrower

Jul.19. 2004 9:28AM

U S Bank Records

No.7400 P. 16

STATE OF MINNESOTA,

OLMSTED

County ss:

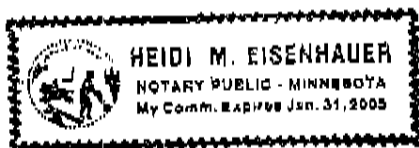
On this 25th day of June, 2003, before me appeared

BRIAN T WHITTLE AND JANELLE L WHITTLE, HUSBAND AND WIFE

personally known to be the person(s) described in and who executed the foregoing instrument and acknowledged that  
they executed the same as their free act and deed,

My Commission Expires:  
(Seal)

*Heidi M. Eisenhauer*  
Notary Public



This instrument was prepared by  
DIANE WERRE  
U.S. BANK N.A.  
1550 EAST 79TH STREET  
BLOOMINGTON, MN 55425

U.S. BANCORP SERVICE PROVIDERS LLC  
4801 FREDERICA STREET  
OWENSBORO, KY 42301

RECORD & RETURN TO: U.S. BANK N.A.  
221 W CHERRY  
NEVADA MO 64772

1000-4R(MN) 87001

Page 6 of 8

Initials: *JW*  
*BTW*



**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

---

In Re:

**CHAPTER 7 CASE**

Brian Thomas Whittle  
SSN XXX-XX-2136  
Janelle Lara Whittle  
Janelle Lara Gager  
SSN XXX-XX-7123

**CASE NO. 04-33814**

Debtor.

---

**MEMORANDUM IN SUPPORT OF  
MOTION FOR RELIEF FROM STAY**

**ARGUMENT**

I. CAUSE EXISTS FOR THE GRANTING OF RELIEF FROM THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d)(1) WHERE THE INTEREST OF THIS SECURED CREDITOR IS NOT ADEQUATELY PROTECTED.

Pursuant to 11 U.S.C. § 362(g) the burden is on Debtor to prove absence of cause and/or adequate protection. Secured Creditor's interest in the property is not adequately protected where:

1. As of August 12, 2004, Debtor is delinquent for the monthly payments as required for the months of June, 2004 through July, 2004, in the amount of \$1,100.48 each and August, 2004 in the amount of \$1,129.95; accruing late charges and attorneys fees and costs of \$700.00.

2. Debtor has failed to make any offer of adequate protection.

II. THE AUTOMATIC STAY SHOULD BE MODIFIED PURSUANT TO 11 U.S.C. § 362(d)(2) WHERE (1) DEBTOR DOES NOT HAVE ANY EQUITY IN THE PROPERTY, AND (2) THE PROPERTY IS NOT NECESSARY TO AN EFFECTIVE REORGANIZATION.

The first requirement under § 362(d)(2) is met where the total of all the encumbrances against the property is in excess of the value of the property. The value of the property as scheduled by Debtor is \$150,000.00 subject to Secured Creditor's mortgage in excess of \$153,356.82.

The property is also subject to a second mortgage in favor of US Bank in excess of \$41,400.00.

Since this is a liquidation case, no reorganization is being attempted.

### **CONCLUSION**

Secured Creditor is entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) for cause, and where its interest in the secured property is not adequately protected. Secured Creditor is also entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2) where Debtor has no equity in the property, and where the property is not necessary to an effective reorganization.

Secured Creditor respectfully requests an Order of this Court modifying the automatic stay consistent with the attached proposed Order.

Dated this 12th day of August, 2004.

### **WILFORD & GESKE**

By /e/ James A. Geske

James A. Geske  
Attorneys for Secured Creditor  
7650 Currell Blvd., Suite 300  
Woodbury, MN 55125  
651-209-3300  
Attorney Reg. No. 14969X

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

In Re:

**CHAPTER 7 CASE**

**CASE NO. 04-33814 GFK**

Brian Thomas Whittle  
SSN XXX-XX-2136  
Janelle Lara Whittle  
Janelle Lara Gager  
SSN XXX-XX-7123

**AFFIDAVIT OF  
LISA ROGERS**

Debtor.

Lisa Rogers, being first duly sworn on oath, deposes and states:

1. That she is the Bankruptcy Manager at National Default Servicing Corporation.

2. U.S. Bank, N.A., is now the holder of a mortgage on real property in which the debtor has an interest. The debtor's indebtedness is evidenced by that certain mortgage deed dated June 25, 2003, executed by Brian T. Whittle and Janelle L. Whittle, husband and wife. The property is located in Olmsted County, Minnesota and is legally described as follows, to-wit:

Lot 18, Block 4, Willow Hills Second, in the City of Rochester, Olmsted County, Minnesota.

3. That she has reviewed the account records relating to the Whittle's mortgage loan, account no. 7890800537.

4. That as of August 6, 2004, the following amounts were owing on this account:

Unpaid Principal:	\$150,397.46
Interest through August 1, 2004	2,067.96
Attorney's Fees:	700.00
Late Charges:	44.02
Pro Rata MIP/PMI:	122.38
Other Fees:	25.00

<b>TOTAL:</b>	<b>\$153,356.82</b>
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5. That the mortgage loan is delinquent for monthly mortgage payments for the months of June, 2004 through July, 2004 in the amount of \$1,100.48 each and August, 2004 in the amount of \$1,129.95.

6. This affidavit is given in support of the motion of U.S. Bank, N.A. for relief from the automatic stay.

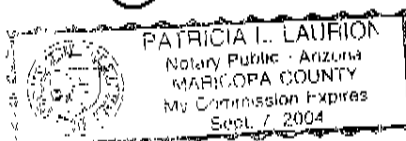
NATIONAL DEFAULT SERVICING CORPORATION

By

*Lisa Rogers*  
\_\_\_\_\_  
Its Bankruptcy Manager

Subscribed and sworn to before me  
this 6<sup>th</sup> day of August, 2004.

Notary Public



**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In Re:

**CHAPTER 7 CASE**

Brian Thomas Whittle  
SSN XXX-XX-2136  
Janelle Lara Whittle  
Janelle Lara Gager  
SSN XXX-XX-7123

**CASE NO. 04-33814**

Debtor.

**UNSWORN DECLARATION  
FOR PROOF OF SERVICE**

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Diana Waletzko, employed by Wilford & Geske, attorneys licensed to practice law in this Court, with office address at 7650 Currell Blvd., Suite 300, Woodbury, Minnesota, declares that on August 12, 2004, I served the annexed Notice of Hearing and Motion for Relief from Stay, Memorandum in Support of Motion for Relief, Affidavit of Lisa Rogers, and proposed Order to each person referenced below, a copy thereof by enclosing the same in an envelope with first class mail postage prepaid and depositing the same in the post office at Woodbury, Minnesota addressed to each of them as follows:

Brian T. Whittle  
Janelle L. Whittle  
204 2<sup>nd</sup> St SW  
Stewartville, MN 55976

Michael S. Dietz  
505 Marquette Bldg  
PO Box 549  
Rochester, MN 55903

David J. Jones  
Jones Law Firm  
PO Box 7014  
Rochester, MN 55903-7014

U.S. Trustee  
1015 U.S. Courthouse  
300 South 4<sup>th</sup> Street  
Minneapolis, MN 55415

US Bank  
PO Box 790415  
St. Louis, MO 63179-0415

And I declare, under penalty of perjury, that the foregoing is true and correct.

Dated this 12th day of August, 2004.

/e/ Diana Waletzko  
Diana Waletzko

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In Re:

**CHAPTER 7 CASE**

Brian Thomas Whittle  
SSN XXX-XX-2136  
Janelle Lara Whittle  
Janelle Lara Gager  
SSN XXX-XX-7123

**CASE NO. 04-33814**

Debtor.

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**ORDER**

The above entitled matter came on for hearing upon motion of U.S. Bank, N.A. (hereinafter "Secured Creditor"), pursuant to 11 U.S.C. § 362 on September 1, 2004, at U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota. Appearances were as noted in the record. Based upon the evidence adduced at said hearing, the arguments of counsel, and the Court being fully advised of the premises,

IT IS HEREBY ORDERED that Secured Creditor, its assignees and/or successors in interest, is granted relief from the stay of actions imposed by 11 U.S.C. § 362 with regard to that certain mortgage deed dated June 25, 2003, executed by Brian T. Whittle and Janelle L. Whittle, husband and wife, recorded , as Document No. covering real estate located in Olmsted County, Minnesota, legally described as follows, to-wit:

Lot 18, Block 4, Willow Hills Second, in the City of Rochester, Olmsted County, Minnesota and may pursue its remedies under state law in connection with the subject note and mortgage deed. Notwithstanding Federal Rules of Bankruptcy Procedure 4001(a)(3), this Order is effective immediately.

Dated:\_\_\_\_\_

\_\_\_\_\_  
Judge of Bankruptcy Court